STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED March 8, 2005
v	No. 253270 Wayne Circuit Court
JAMAL LATAZ KING, Defendant-Appellant.	LC No. 03-009642-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree murder, MCL 750.317, and carrying or possessing a firearm during the commission or attempted commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 30 to 65 years for the second-degree murder conviction and to 2 years, to run consecutively and preceding the second-degree murder sentence, for the felony-firearm conviction. We affirm.

I. Facts

Defendant was charged with crimes arising out of the July 19, 2003 shooting death of Jermaine Frazier. On the afternoon of the shooting, Frazier went to Roland Robertson's house to borrow a drill bit. Robertson said that Frazier told him about something and that he responded by telling Frazier that, "he better be careful." Robertson testified that he heard a commotion as he came back outside and saw defendant chasing Frazier with a handgun. Robertson saw defendant shoot Frazier in the back as Frazier ran towards his walkway. Frazier bounced off a fence and ran towards the middle of the street. Robertson testified that he yelled to defendant, "Hey, don't do that; Don't do it. Ain't worth it." Defendant looked back at Robertson and then shot Frazier in the back again. Frazier then fell in the street. Robertson testified that he again told defendant, "It ain't worth it, just ain't worth it. Don't do it," and defendant again looked back, but proceeded to shoot Frazier as he lay in the street. Robertson then watched defendant get into the passenger side of a waiting car and leave.

Diane Gidney, an acquaintance of Robertson's mother, was leaving Robertson's house at the time of the shooting and saw defendant chase Frazier and shoot him in the back with a black-handled gun just before he ran into the fence. She also heard Robertson telling defendant not to shoot Frazier, but watched as defendant ran after Frazier and continued to shoot him until he fell in the street.

In addition, Xalivianna Smith testified that she was speaking with Frazier just minutes before the shooting about an incident that had occurred the night before. After Frazier left her house, she stated that she heard gunshots and saw defendant running down the street. She testified that she saw defendant standing over Frazier holding a gun and then saw him get into a car and leave. When she went to assist Frazier, he said to her, "You told me, you told me, you told me." Smith testified that she knew what Frazier meant by that. She also said that Frazier told her that "Pops" shot him and that she knew defendant as "Pops."

At trial, defendant denied that he was the person who shot Frazier and presented several alibi witnesses in his defense.

II. Sufficiency of the Evidence

Defendant first argues that the charge of first-degree premeditated murder should not have been submitted to the jury because there was insufficient evidence of premeditation. This error, defendant alleges, led the jury to an impermissible compromise verdict. Defendant contends that this compromise verdict mandates reversal. We disagree.

This Court reviews evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of first-degree murder were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). To prove first-degree murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). To premeditate is to think about before hand. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). There must be more than the amount of thought necessary to form the intent to kill. *Id.* at 301. To "deliberate" is to measure and evaluate the major facets of a choice or problem. *Id.* at 300 (citation omitted). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Saunders*, 189 Mich App 494, 495-496; 473 NW2d 755 (1991).

In this case, the evidence clearly supported submitting the first-degree murder charge to the jury. In order to successfully kill Frazier, defendant had to chase Frazier down and shoot him three times. All the while, defendant could have simply let him go, but instead he deliberately continued to chase him down. Furthermore, defendant was twice told to stop, and twice he looked back only to return to the chase and shoot Frazier. Each time defendant looked back, he had to weigh his actions, and each time he deliberately decided to continue the chase and fire upon Frazier. From this evidence alone, a reasonable jury could infer that defendant premeditatedly and deliberately killed Frazier. See *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979) (holding that a lapse of time between shots as defendant pursued the victim was sufficient to establish premeditation). Therefore, the first-degree murder charge was properly submitted to the jury.

Defendant also argues that the prosecution failed to present sufficient evidence to support his conviction of second-degree murder. A defendant is guilty of second-degree murder where it is shown beyond a reasonable doubt that the defendant caused the death of the victim and that the killing was done with malice and without justification or excuse. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice is the intent to kill, the intent to do great bodily harm,

or the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984). In this case, three people saw defendant chase a defenseless Frazier, shoot him in the back twice, then stand over him and shoot him again. This evidence was clearly sufficient to support the jury's finding that defendant killed Frazier with malice and without justification.

Defendant also contends that his trial counsel was constitutionally ineffective for failing to move for a directed verdict on the grounds of sufficiency of the evidence. Because we have determined that these charges were properly submitted to the jury, such a motion would have been futile. Defense counsel is not required to bring a futile motion for directed verdict. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

III. Prosecutorial Misconduct

Defendant further contends that the prosecution made improper remarks during closing arguments. Defendant failed to object to the alleged instances of misconduct and, therefore, they are unpreserved. This Court reviews unpreserved claims of prosecutorial misconduct "for plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To demonstrate plain error, the defendant must show that: "(1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights." *Id.* (citation omitted). The third factor requires that the defendant demonstrate that the error was outcome determinative. *Id.* Even if all of these elements are shown, this Court may not reverse unless the error resulted in the conviction of an actually innocent person or "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* Finally, this Court will review claims of prosecutorial misconduct on a case by case basis, "examining the remarks in context, to determine whether the defendant received a fair and impartial trial" and "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first contends that the prosecutor engaged in misconduct by referring to discussions that occurred during voir dire. Defendant claims that these references constituted arguments about facts not in evidence that prejudiced defendant and, as a result, warrant a new trial. We disagree.

During voir dire, the prosecutor engaged the prospective jurors in a discussion about premeditation where the prosecutor explained that premeditation and deliberation can occur in a very short timeframe. The prosecutor explained this concept by referring to the common experience of approaching a stop light and determining whether to stop or continue through the light. During closing argument, the prosecutor reminded the jury about this discussion concerning premeditation and deliberation and told them that these are just big words for "things we do every day . . . such as stopping at a traffic light." Because a prosecutor may make arguments based on the jury's common experience, *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003), this comment was not an impermissible argument based on facts not in evidence.

Defendant also finds fault with the prosecutor's remarks concerning Gidney's credibility. The prosecutor argued that Gidney's testimony was credible and that her reluctance to identify

defendant should not be held against her because her fear was understandable, given the nature of the crime. The prosecutor went on to say, ". . . there is no surprise that people see their assailants, see perpetrators of crimes and, because of fear, do not identify those people. Some folks, as we know now, even blow lineups, if you will, because they're afraid for their own lives and afraid for their families and that's just reason and common sense, ladies and gentlemen, but it doesn't negate the fact that a person has seen the things that they have seen." The reference to the blown lineup was based upon a prospective juror's admission during voir dire that, out of fear, he once deliberately misidentified the perpetrator of a violent crime during a lineup.

Although the reference to the lineup could be construed as an argument based on facts not in evidence, when viewed in context, the prosecutor's remarks are more properly understood to be an argument based upon the jury's common sense and practical experiences. Hence, this reference was not improperly made. *Ackerman*, *supra* at 450. Furthermore, the trial court properly instructed the jury that the trial attorneys' arguments were not evidence and that the jury may only make its decision based upon evidence actually admitted and their common experiences. Therefore, there was no error affecting defendant's substantial rights.

Next, defendant contends that he was prejudiced when the prosecutor impugned the integrity of his trial counsel. During closing argument, the prosecutor commented on defendant's alibi witnesses by stating, "We have enough integrity to not parade several people to say, no, even though I knew he did wrong, we are going to have people come in here and say he wasn't there. That is not integrity." Although defendant correctly notes that a prosecutor may not suggest that defendant's trial counsel is intentionally attempting to mislead the jury, *Watson*, *supra* at 592, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). For this reason, this Court will "not review the prosecutor's remarks in [] a vacuum; the remarks must be read in context." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). The scope of the review is important, "because an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id.* Taken in context, the prosecutor's remark was a commentary on the incredibility of defendant's alibi defense and defendant's own credibility. A prosecutor may properly argue that witnesses, including the defendant, are not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Therefore, there was no plain error. Even if we were to hold that this comment was plain error, it is unlikely that this one isolated comment affected the outcome of the trial given the highly credible testimony of three eyewitnesses who each corroborated the others' description of the murder and directly identified defendant as the killer. Consequently, a new trial is not warranted.

Defendant also argues that the prosecutor improperly made a sympathy argument when commenting that defendant gunned down Frazier "like an animal." Emotional language may be used during closing argument and is "an important weapon in counsel's forensic arsenal." *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). Likewise, the prosecution need not confine its argument to the blandest of all possible terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). When read in context, the prosecution's statement, in light of the testimony by Robertson that he saw defendant chase down Frazier and shoot him three times in the back, once while Frazier lay prone in the street, was a fair characterization of the events. Therefore, there was no error.

Defendant next argues that he was denied a fair trial because of the cumulative effect of the prosecution's improper statements. This argument lacks merit. As stated above, the prosecution's arguments did not constitute plain error that affected defendant's substantial rights. Furthermore, even if we were to assume that the prosecutor's remark about defendant's integrity was error, the trial court instructed the jury that its job was to decide the facts and apply the law as given by the trial court, that it could only consider the evidence admitted, and that the lawyers' statements and arguments were not evidence. These instructions cured any prejudice against defendant that may have resulted from the prosecution's statements. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.").

Finally, defendant argues that his trial counsel was constitutionally ineffective by failing to object to any of the alleged instances of prosecutorial misconduct. A criminal defendant has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this burden, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under the circumstances and according to prevailing professional norms and then must show that there is a reasonable probability that but for counsel's errors, the trial outcome would have been different. *Id.* at 663-664 (citations omitted). Because we have determined that all of the alleged instances of prosecutorial misconduct were not in fact misconduct or did not affect the outcome of the trial, defendant's trial counsel was not constitutionally ineffective for failing to object to them.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski